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Supreme Court of the United States

October Term, 1931

No. 736

I. RUDE, PETITIONER,

vs.

JOSEPH BUCHHALTER, THE FIRST NATIONAL BANK OF DENVER, A BANKING CORPORATION; G. DEXTER BLOUNT, HARRY SILVERSTEIN AND DAVID ROSNER, CO-PARTNERS DOING BUSINESS AS BLOUNT, SILVERSTEIN AND ROSNER, RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HENRY E. LUTZ,
Counsel for Respondents, Buchhalter, Blount, Silverstein and Rosner.

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STATEMENT.

MAY IT PLEASE THE COURT:

The statement of this case as made in the petition is neither adequate nor sufficiently accurate to inform the Court of the nature of this controversy. We shall endeavor to briefly set it forth.

The petitioner Rude, as plaintiff in the trial court, sought by bill (pages 1-6, R.) a lien upon the escrow in question, for what he claimed was a personal indebtedness of Buchhalter to himself. He alleged that such indebtedness consisted of the balance due (after giving certain credits) on a promissory note bearing date August 29, 1929, in the principal sum of $67,500.00. To gratify this alleged balance, in the purported sum of $59,699.61, he sought the sale of the entire escrow proceeds and a deficiency judgment in the event of inadequacy. The defendant Buchhalter set up in his answer (pages 13-22, R.) vigorous and emphatic denial of any personal obligation to Rude whatsoever and asserted that the note in suit was fictitious and represented no obligation. He alleged, upon the contrary, that the escrow in question belonged to himself and Rude in the proper proportion of their respective investments in the enterprise that gave rise to the escrow involved. The answer of the defendants, Messrs. Blount, Silverstein & Rosner (pages 22-26, R.) was wholly corroborative of the allegations of Buchhalter's answer. These last named parties were made defendants by Rude upon the ground that their attachment (in the State court) of the escrow proceeds was subordinate and inferior to the lien claim of himself (page 5, R.) and that these defendants had full knowledge "of the rights of plaintiff and of all the matters set forth in this bill." Be it noted, in passing, the attachment of Messrs. Blount, Silverstein & Rosner was in aid of an alleged indebtedness for attorneys' fees owed, so it was and is claimed, jointly by Messrs. Rude and Buchhalter to them. All said

rights of lien in Rude, as well as those of the alleged personal indebtedness of Buchhalter to him were likewise denied.

Buchhalter's answer (page 21, R.) specifically set up that Rude's bill was fraudulent in its entirety; that he was in court with unclean hands; that instead of accepting his due and proper proportion of the escrow funds according to his rights and interests, he sought to impose a personal liability on Buchhalter through the medium of a note that never represented an obligation; that he was seeking to employ the writs, processes and functions of a court in equity in order to perpetrate a fraud, not only upon all the defendants, but upon the court as well. Buchhalter prayed (pages 21-22, R.) that Rude's claim of indebtedness and lien be denied; "that said bill be declared to be unconscionable and inequitable; that same be dismissed upon the merits; for costs and for all such other and further relief as in equity and good conscience the facts warrant."

We do not propose to review the evidence. A few vital features, however, so far as they portray or establish the corrupt intent of the plaintiff Rude, will be pointed out.

Long before the institution of Rude's suit, and well known to him, the validity of the title to the property whereon the escrow bonds rested, and all during the pendency of this cause, continued to be involved in litigation in the Supreme Court of Colorado, and hence the bonds were without market and were of wholly problematical value (page 72, R.). This fact served to supply a desire on Rude's part

to inflict, if he could, a personal obligation on Buchhalter so that the latter would bear the sole hazard of that litigation.

Conditions became highly acrimonious between these two and Rude admitted on the witness stand (page 79, R.) that it was his intention to "break" Buchhalter. The evidence further established that prior to the institution of his suit, he had stated to the defendant Rosner (page 99, R.) that he was going to "get" Buchhalter, no matter what it cost him, and that he knew the $67,500.00 note in suit was fictitious. Yet again, and prior to the institution of his said suit, Rude went so far as to write a letter to the wife of the defendant Buchhalter, that unless a settlement "satisfactory" to himself was made, adverse publicity would ensue for the whole family; that they would be "dragged through the mire" (Defendant's Ex. 5, page 229, R.).

Such were the motives and purposes with which this man sought entrance into a court of equity.

Now, respecting the escrow in question and the bonds and funds going to comprise it, let us briefly see the record of Mr. Rude's testimony respecting his connection with it, as well as his interest in it. It is to be here remembered that he now asserts that he is being deprived of property without due process of law. He swore upon his oath that he never owned the property of which he now asserts he is being deprived. Let the record speak (page 72, R):

(Cross-Examination of the Plaintiff Rude.

"Q. These bonds and funds that are over there in the Bank, Mr. Rude, to whom do they belong? A. The bonds?

Q. Yes. A. Mr. Buchhalter.

Q. They all belong to him? A. No, I don't know that they all belong to him. They are held there as security. They belong to me.

* * * * *

Q. Do you claim to own any of the funds or any of the bonds now in escrow in The First National Bank and now in suit? A. I own them all. I claim them as security of my note."

But the fact of Buchhalter's ownership of the escrow, subject only to Mr. Rude's lien, did not rest alone upon Rude's testimony. His counsel, Mr. Morris, in open court conceded title to be in Buchhalter. (See page 187 of the Record for the following):

"*The Court to Mr. Morris:* You don't claim any title to the bonds, do you?

Mr. Morris: We claim that the bonds are held as security for the amount Mr. Buchhalter promised to pay.

The Court: Where is the title? There must be a title somewhere, not floating around in the air. In other words, if you claim a lien against a piece of property, that is an admission that some one else holds the legal title.

Mr. Morris: I think that, subject to the lien, Mr. Buchhalter had the legal title to the bonds."

Respecting the note (page 37, Brief), which Mr. Rude mentioned in his testimony last above, and which counsel now assure us is not in suit, Mr. Rude has this to say (page 76, R.):

> "Q. And this note was a valid note from the time given up until now? A. Yes, sir.
>
> Q. That is your contention? A. Yes, sir."

Such, may it please the Court, in perhaps scant, but none the less indicative outline, was and is the nature of this cause.

The trial court dismissed Rude's bill on the merits, in effect, saying his testimony (page 262, R.) was incredible. That court, and apropos of no issue raised by Rude, and in the face of his denial of ownership of any part of the escrow proceeds, other than as security for his note, made the finding that, as of date August 16, 1929, these parties' investment in the enterprise (not in the escrow) was as $61,000.00 for Rude and $53,992.00 for Buchhalter, and there the cause rested so far as the trial court was concerned.

Cross-appeals were taken. It was Buchhalter's contention that Rude ought to be taken at his sworn word respecting ownership of the escrow—this oath fortified, as we have seen, by his counsel's concession respecting the legal title thereto; that Rude had sought to perpetrate a gross fraud in the manner set up in the answers; that he was in a court of equity with unlcean hands and that under the facts obtaining, that doctrine ought to find strict application; that

the escrow should be dissolved; that the mere fact that property was in a third person's hands could not serve to enlarge the rights of an unclean plaintiff, and that under equitable principles, Rude should have been remitted to such remedy at law as he might be advised.

Rude in his appeal renewed all of his contentions below. He sought a personal judgment, a lien on the escrow, its sale, etc., bringing forth also a few additional contentions, apparently for good measure. As remarked by Judge McDermott in his opinion denying the petition for rehearing (page 304, R.), five pages of Rude's brief were devoted to argument that equity, having jurisdiction, ought to wind the matter up by ordering an accounting or in such other fashion as might fit the case.

Hence the Court of Appeals, taking Rude at his word in that respect, undertook to finally adjudicate the controversy on the ground, among others, so it said (page 275, R.) that the public be not put to the expense of another trial. "The facts are before us and we have concluded that this Court of Equity having taken hold of the matter, should wind it up."

It was thereupon concluded by the Court of Appeals, and notwithstanding Rude's sworn statement that Buchhalter owned the escrow, and notwithstanding also counsel's concession of legal title in Buchhalter, subject only to Rude's alleged right of lien, that (page 275, R.), "the fact is that Rude and Buchhalter own these securities jointly." Thus, by virtue of that finding, and that finding alone, and in opposition to Rude's whole hypothesis and theory of suit,

does he become vested with an interest in the escrow that we are now told he is deprived of without due process of law. But in arriving at that conclusion respecting the ownership of the escrow, the Court of Appeals further said (page 275, R.):

> "If this were the ordinary case of a claim being honestly but mistakenly asserted, such a decree should be entered, Rude paying the costs of the case. But we are convinced that Rude's claim was not put forth in good faith and that his testimony is materially false. Equity abhors a forfeiture, and, unconscionable as Rude's conduct is, we are not at liberty to forfeit his property, particularly to one whose conduct is not irreproachable. But equity should right the wrong as near as may be. Rude has put Buchhalter and the Bank to the expense of defending a claim conceived in bad faith. Any decree should therefore be so conditioned as to impress upon Rude's share of the securities, a lien in favor of Buchhalter and the Bank for the expenses to which they have been put by the assertion of this groundless claim, the amount thereof to be determined by the trial court."

In summary, then, of the facts: This man Rude, in his efforts to "break" and "get" Buchhalter and to drag the latter and his family "through the mire," as he expressed it (see references *supra*), fraudulently sought to impose upon Buchhalter a personal liability for a large amount, and in order to effectuate that end, was willing to and did disclaim

interest in the subject-matter of the escrow, other than by way of lien, and sought, as well, to similarly defraud all of the other defendants in the cause, through the instrumentality of a court of equity. But notwithstanding all this, and much more not here adverted to, the Court of Appeals, none the less, awarded him his actual interest in the escrow (solely on defense pleadings and evidence), imposing the equitable requirement that he hold the defendants Buchhalter and the Bank harmless from, not their damages, but their actual outlay.

We now address ourselves, with what brevity we may, to the petition for certiorari. It is believed that the opinion of Judge McDermott (pages 303-307, R) denying the motion for rehearing, is a complete and unimpeachable answer to the several points raised. This Honorable Court's perusal of that opinion in its entirety is respectfully requested. We shall refrain from repeating his argument or any of it. We content ourselves with a few general observations.

"POINT A."

(Page 15, Petitioner's Brief)

It is here asserted that Rude has been deprived of property without due process.

The facts are incontrovertible that instead of having been deprived of property, he was awarded it. The adage that "There is nothing new under the sun," must give way in this case. It is new—brand new—for one to contend that when he has been given his actual rights and actual property interests, in the face of his corrupt disclaimer, that he is deprived of

property without process because equity has been exacted of him. It was well within the power of the Court of Appeals—nay, almost on the border line of requirement, in view of Rude's unconscionable conduct, his deliberately fraudulent hypothesis in seeking recovery upon a fictitious instrument—to have dissolved the escrow and remitted him to his action, if any, at law. Had the Court of Appeals seen fit to go so far and thus deprive Rude of his entire interest in the escrow, there would be no room for the contention that he was deprived thereof without process. Because the Court saw fit to overlook his malign purposes and his "materially false" testimony, to look through the shadow, dark as it was, into the substance and to award him his corruptly disclaimed interest, conditioned that he at least to some extent make amends, leaves less room for that now grotesque contention.

Rude sought the Court of Appeals' adjudication. Any condition imposed was necessarily invited. The record was before the Court. It spoke for itself. To have granted a hearing upon the conditions imposed, as is now contended should have been done, would have been nothing other than the equivalent of granting a new trial or a new opportunity for Rude to explain his "unconscionable conduct." Such a procedure as that now contended for would have been, indeed, extraordinary. There can be and is no suggestion that the case was not fully tried; that the record was incomplete, or that Rude did not have his day in court upon the merits. We shall not further discuss this matter.

State statutes allowing the recovery of attorney's fees in special classes of actions have been repeatedly upheld as against constitutional objection.

Farmers and Merchants Insurance Co. v. Dabney, 189 U. S. 301.

Missouri, Kansas & Texas Ry. Co. v. Harris, 234 U. S. 412;

Chicago & Northwestern Ry. Co. v. Nye, etc., Co., 260 U. S. 35;

Fidelity Mutual Life Association v. Metler, 185 U. S. 308, *et seq.*

It would constitute an anomaly if courts may not exact equity in the form of an attorney's fees allowance without running counter to constitutional inhibition.

"POINT B."

(Page 18, Petitioner's Brief)

"The award of fees and expenses is contrary to principle and precedent," so it is said.

The law on this matter is fully covered by Judge McDermott's discussion. We add only a comment. Whatever the rule may be, as applied to honest though mistaken litigants, it can have no relationship to the extraordinary facts of this case. Whatever the rule may be as respects merely vexatious litigants, it is still without applicability here. Whatever the rule may be as applied to litigants who allege in pleading, fraud and scandal against their adversaries, even that can have no applicability here. The instant case presents a spectacle of an intended abuse of the writs and functions of a court of equity in aid, as we confidently assert the record discloses, of what was in-

tended by Rude to be a wholly fraudulent cause of action in the effort to break and destroy his adversary, along with the gratification of inordinate cupidity. Hence it is that we do not stop to review or distinguish the numerous cases referred to by our opponents under this heading. But much of this discussion would seem to be somewhat besides the question. The controversy in the instant case is not so much whether attorneys' fees, as such, are allowable to an adversary. That would seem to be incidental. The question is whether a court of equity may not require, as a condition to requested relief, a corrupt and fraudulent plaintiff, on his part, to do equity to wronged adversaries, and this, irrespective whether that equity consists of reimbursement for outlay or some other suitable requirement.

The equity in this case directed to be performed by the Court of Appeals was and is that the petitioner, Rude, reimburse the respondents Buchhalter and the Bank for their outlay in combating for a period of approximately two years, what was found by the Court to be a groundless and unconscionable claim. There is no element, there is no aspect, of damage award. The respondent Buchhalter is not indemnified for the two and more years' loss of the use of his share of the escrow. He and the Bank are merely held whole from the outlay occasioned by an attempted fraud sought to be effectuated through the instrumentality of a court of equity. It requires neither argument, we take it, nor yet the citation of authority, that a court of equity may impose conditions upon requested relief. Such has been the immemorial practice. The contention of the peti-

tioner, under the guise of a clamor against attorneys' fees, resolves itself, in effect, into the assertion that he should not have been made to do equity—in short, that he should be invested, scot-free, with that which he falsely swore he did not own, and which his counsel conceded belonged to Buchhalter, subject only to a right of lien. If the petitioner, Rude, be correct in his contention, then a court of equity subsides into a mere instrumentality of a corrupt and fraudulent litigant.

"POINT C."

(Pages 32-34, Brief of Petitioner)

Under this heading it is stated that "The doctrine that a court of equity may grant relief only upon conditions, is inapplicable."

If this assertion constituted argument or had any relationship to the facts as they exist in this cause, it would receive attention. We have hereinabove noted the salient facts and the unprecedented nature of the controversy. Hence the utter fallacy of the postulate becomes apparent.

To characterize the requirement, as has been done, that a corrupt suitor appealing to a court for relief, and by which he becomes invested with property, the ownership of which he disclaimed, should hold his adversary harmless from outlay, as arbitrary, strikes the writer as bordering on the facetious.

Under Section 2 of the heading last noted (pages 33-34, Brief), it is said that conditions should not be absolute; that "the party should have his option to

reject the whole decree." This is ordinarily true and is frequently, though not invariably done. In the instant case, however, the petitioner Rude never asked or sought from the Court of Appeals an alternative. Hence, we take it, he is now foreclosed against that contention. Had Rude desired an alternative, it would have been an easy matter to have requested the Honorable Court of Appeals to afford it to him. A half dozen lines additional would have sufficed. The only possible alternative afforded by the nature of the case would be to dissolve the escrow in Buchalter's favor, subject to the rights of the other parties, and remit Rude to such action at law as he may be advised he possesses. But Mr. Rude did not desire the alternative and made no request therefor.

It is stated (near the top of page 34, Brief) that "Petitioner Rude owns over one-half thereof" (referring to the $90,000.00 par value of bonds in escrow). We make no charge that our opponents in any manner seek to mislead this Honorable Court, but nowhere in their petition or brief have they informed it that whatever Mr. Rude may own in the escrow came to him by way of express award of the Honorable Court of Appeals, and such award in the face of his sworn assertion that he had no ownership whatsoever therein; that his interests were confined to lien rights only. That single and incontrovertible fact dissipates his every contention here.

"POINT D."

(Page 35, Petitioner's Brief)

It is here said that the Court of Appeals "erred in holding that petitioner had not brought his suit in good faith."

This simply raises a question of fact under the record. The only inquiry possible would be whether there was sufficient evidence to sustain the finding. The limited portion of the evidence that we have seen fit to hereinbefore present to this Honorable Court demonstrates beyond cavil, captious or otherwise, that any contrary ruling would have been a travesty. The inquiry ends.

"POINT E."

(Pages 37-39, Petitioner's Brief)

It is here asserted that the Court of Appeals erred in holding that, "It was the assertion of the false and groundless claim that prevented a distribution of the fund without the aid of equity."

This contention falls within the exact category as that noted last above. But some of the purported statements of fact are so divergent from those actually obtaining, that we undertake a correction. In the first place, it is stated (page 37, Brief) that the Court's holding is contrary to the evidence. This is emphatically disputed in its entirety.

It is next asserted that "Both the District Court and the Circuit Court of Appeals held that the funds and bonds in escrow are owned by Rude and Buchhalter in the proportion that $61,000.00 bears to $53,922.00."

The District Court absolutely held no such thing. Its holding was (bottom of page 43 and top page 44, R.): "That plaintiff (Rude) and defendant Buchhalter were interested in the properties theretofore belonging to the Colorado Pulp and Paper Company and that on August 16, A. D. 1929, plaintiff's investment in said properties was $61,000.00 in principal and that of defendant Buchhalter was $53,922.00."

The escrow did not arise until November, 1929. Rude's suit has as its basis the alleged balance due on a note for $67,500.00, dated August 29, 1929, and we have seen again and again that Rude swore that he had no interest whatsoever, by way of ownership, in the escrow, and the finding of the District Court had no relationship whatsoever to that matter.

It may be well at this juncture to invite the attention of the Court to Mr. Rude's bill. The prayer thereof (pages 5-6, R.) in itself shows that his only claimed interest was not by way of ownership, but by way of lien. For convenience sake we here set it forth. It reads:

> "Wherefore, plaintiff prays that his said lien be adjudged and declared a first and prior lien on all assets held in said escrow and that said bonds hereinbefore described, held in escrow by said defendant Bank, be sold to satisfy said lien and that said Bank be directed to pay over to said plaintiff all cash held by it in said escrow and the proceeds realized from the sale of said bonds, not in excess of $59,699.61 and accrued interest from November 18, 1929, at the rate of eight per cent per

annum; and for judgment against defendant Buchhalter in the sum of $59,699.61, together with interest at the rate of eight per cent per annum from November 18, 1929; and that all sums paid from said escrow, both in cash now in hand and the proceeds of the sale of said bonds, be credited on said judgment; and for such other and further relief as to the court may seem just."

We are assured, in italics, on page 37 of petitioner's brief, that Rude's "suit was not on the note. The note was set out merely by way of background and was, at most, a collateral matter."

In passing, let us look also into the accuracy of this statement. On page 2, Record, paragraph 2 of Rude's bill, he states receipt by himself of the promissory note of Joseph Buchhalter for the sum of $67,500.00, alleging also a further sum due him from Buchhalter, of $7,500.00. He tells us (Paragraph V, page 3, Record): "On or about the 18th day of November, 1929, plaintiff, I. Rude, and Joseph Buchhalter entered into an oral agreement at The First National Bank of Denver, whereby its was agreed that said I. Rude would be paid at once by said Joseph Buchhalter the full amount of his note and accrued interest, in cash, in the sum of $67,500.00 plus accrued interest, together with $7,500.00," etc., etc.

Now, for what does he sue? He sues for the sum of $59,699.61. The total amount claimed was $75,000.00. He pleads a credit of $16,365.34. That sum deducted from $75,000.00, which is comprised, in turn, of the $67,500.00 note and the $7,500.00 item, less

the credit received, equals exactly $59,699.61. Yet counsel blandly inform us that the note was, "at most, a collateral matter."

To return to the statement that the District Court held Rude "owned" the escrow in the proportion designated: The District Court refused to adjudicate the controversy and merely found respective investments of the parties in their preceding enterprise. Now, the Court of Appeals did find as stated. That Court did award to Rude a proportionate ownership in the escrow, in face of his denial, in face of the fact that he sought only a lien, in face of the fact that he swore to Buchhalter's ownership, and in face of his counsel's concession that legal title was in Buchhalter.

It is next stated (top of page 38, Brief): "The documentary evidence conclusively supports such holdings" (Ex. B, page 196, R.). This will be found to be a letter signed by both Rude and Buchhalter, as of date August 16, 1929, stating not their interests in the escrow, which had not then nor for long thereafter come into life, but stating, as the District Court found (basing it on this letter), what their interests in their preceding enterprises were.

These matters can scarcely be of consequence to this Honorable Court in the present proceeding. But for the sake of common accuracy we cannot let them pass unchallenged.

Some aspersion (page 38, Brief) is attempted to be cast on Buchhalter because he contended below that subsequent to August 16, 1929, the date of the

District Court's finding and the date of the exhibit referred to, he had invested the further sum of $4,500.00. This was testified to not only by Buchhalter, but also by the witness Block (page 117, R.), the latter stating also that Rude agreed thereto; and respecting this matter, our opponents said (on page 35 of their Brief for Rude, as filed in the Court of Appeals): "If Buchhalter actually invested other money after that date (August 16, 1929) he can easily establish the exact amount by competent evidence when the occasion arises." Now, we are gratuitously told that Buchhalter has sought a greater than just share of the escrow proceeds.

Let it be noted, and noted well, that save for Buchhalter's pleadings and evidence, neither court below would have ever known that Rude ever had any interest by way of ownership in the escrow, and save for Buchhalter's pleadings and his evidence, Rude would never have been awarded any interest therein by the Court of Appeals.

It is next asserted (page 38, Brief): "In the Circuit Court of Appeals, Rude asked the funds and bonds be distributed between him and Buchhalter. Buchhalter resisted this."

It is true that Rude, notwithstanding that his whole suit below was to establish a lien as against Buchhalter, using as the basis therefor a fictitious instrument and resorting to all his attendant denials of ownership in the escrow, did ask the Court of Appeals to distribute the funds and bonds of the escrow to himself and his adversary. He did not ask it on the strength of even so much as a single

word of either allegation or testimony of his own. He brazenly asked it in the face of his own sworn contrary hypothesis. He asked it on the basis of the admissions of Buchhalter's answer. And Buchhalter did resist it, solely on the grounds alleged in his answer, and established by overwhelming proof, that Rude's entire suit was fraudulent and fictitious, and that in consequence, he should be remitted to his remedies, if any, at law.

As repeatedly noted, the Court of Appeals acceded to Rude's request, ordered an accounting and fastened upon him the requirement that he do at least partial equity.

What particular variety of assurance counsel possess, we need not inquire. But in face of the pleadings and the indisputable facts of this case, we are next informed that (page 38, Brief) "accordingly it was never possible for Rude to obtain his just proportion without resort to equity. An accounting has always been and still is necessary."

If such be true, why did they go into court on the sworn hypothesis that Rude never owned any proportion, "just" or otherwise; that his were lien rights only—and if an accounting had "always been necessary," why did they not institute such a suit in the first instance instead of the unconscionable one to which resort was had? Save for Buchhalter's pleadings and evidence, as we have had occasion so many times to repeat, Rude would not even now have any interest, "proportionate" or otherwise, in the escrow —that award to him, which he now so eagerly and avidly claims was bestowed upon him, his disclaimer

notwithstanding. But the question is, was the Court of Appeals right in saying that Rude's groundless and false assertions of claim prevented a distribution of the funds without the aid of equity? Can this Honorable Court think otherwise on this record?

"POINT F."

(Pages 39-41, Brief of Petitioner)

It is here contended that Buchhalter's appeal should have been dismissed on the grounds: First, that "indispensable parties were omitted." This is wholly fallacious and untenable. The Bank procured all the relief it sought, to-wit, dismissal at Rude's costs, save that it did not receive, as requested, advice what to do with the escrow. It was destitute of interest save as to who owned the escrow. Buchhalter's appeal was calculated to settle that question as between himself and Rude. Besides that, Buchhalter's appeal was taken solely from the trial court's refusal to enter the tendered findings of fact and conclusions of law. An appeal of such nature operates not on the parties directly. It operates instead, directly upon the court below, before whom all the parties were. Had the District Court refused to make any findings whatever, the remedy would clearly have been by mandamus and none of the parties would have been before the Appellate Court save the party applying for the writ. An appeal from incomplete and inadequate findings of necessity operates in that identical way. Buchhalter's appeal was to require the court below to establish his rights as against Rude, and as against Rude alone. The Bank did not see fit to pursue its inquiry for instructions and there

was no reason why Buchhalter should attempt to require it to do so. An ascertainment of who owned the escrow put a period to the Bank's solicitude Buchhalter's appeal was to accomplish, if possible, his protection from future litigation at the hands of Rude and an ascertainment as to the disposition of the escrow. But Rude, on his appeal, made not only the Bank a party, but all other defendants as well, and their present contention resolves itself into nothing other than a specious claim that parties are before a court not for all purposes within the confines of the issues, but only for such purposes of their own selection as the party may designate. We cannot refrain from an expression of astonishment that such matters are presented in apparent seriousness to the Supreme Court of the United States.

It quite departs rational discussion, so it seems to us at least, to say, as is said here, that the Court of Appeals was without jurisdiction to make a disposition of the property in question. As before noted, both Buchhalter and Rude appealed. The former made Rude a party alone. The latter made every one before the trial court a party. Jurisdiction was doubly conferred. Rude sought his accounting relief not in the trial court, but before the Court of Appeals. He got it, but not in the manner that he wished. The parties were not only before the court, but two of them were doubly before it, and now because something was or was not done in one appeal as distinguished from the other, jurisdiction was lacking, so it is said. Such, if your Honors please, is the chief contention under "Point F."

We must notice, however, another incorrect assertion. On page 40 of the Brief, it is said: "The other defendants, Blount, Silverstein and Rosner, have an attachment lien upon these same funds and bonds. They likewise were not made parties to Buchhalter's appeal." So much is true. Messrs. Blount, Silverstein and Rosner were represented by the same counsel as Buchhalter, as they are here. They procured all and singular the relief they sought in the trial court, to-wit, dismissal with costs. Such, necessarily, left their attachment intact, free from interference. They were destitute of interest as to who, as between Rude and Buchhalter, owned the escrow in question. They had an attachment lien, whosoever owned it or was declared to own it. Had they joined Buchhalter's appeal they would unquestionably have been dismissed out of the case for sheer want of litigious interest. Rude, of course, had to make them parties because he went before the Court of Appeals still contending that his "lien" was paramount to theirs.

But we are next informed (page 40, Brief): "But Buchhalter, one of the defendants in the attachment suit, sought to destroy that lien by having the Circuit Court of Appeals deliver the attached property to him." If that be true, then the record speaks falsely (pages 42-43, Brief), setting forth the requested findings of fact in Buchhalter's behalf which were rejected by the trial court, and from which appeal was taken. The finding referred to reads, in part:

> "5. That the defendant, The First National Bank, having prayed instructions as to

> the disposition of said escrow funds and bonds, it is hereby directed to turn all and singular the same over to said defendant Buchhalter, subject * * * to any order of the State court respecting the claim of the defendants, Blount, Silverstein and Rosner."

Such is the manner, if your Honors please, in which Buchhalter "sought to destroy that lien by having the Circuit Court of Appeals deliver the attached property to him." And such, also, disposes of the statement made (page 39, Brief), that the Court of Appeals could not order disobedience to the process of the State court. The rights sought were made expressly subject to the process of the State court.

We decline to notice the remainder of the discussion under this heading to the effect that Buchhalter's appeal was frivolous, other than to so characterize the argument itself on that score.

The whole contention under this heading may be disposed of by a holding of the Circuit Court of Appeals of the Tenth Circuit itself. As noted, there were double appeals. The record was doubly before the Court:

> "An appeal in equity brings up the entire record and the Court of Appeals has full power to make and enter its own decree in the cause."
>
> *Swift v. Jackson* (10 C. C. A.), 37 Fed. (2d) 237-240.

The petitioner apparently would wish it otherwise.

"POINT G."

(Page 42, Brief of Petitioner)

It is here contended that the Court of Appeals should not have awarded the Bank its expenses and attorney's fees. The reasons assigned are that the District Court "expressly refused the Bank attorney's fees. The Bank did not appeal, was not a party to Buchhalter's appeal, made no appearance in Rude's appeal, but was awarded this relief in Buchhalter's appeal."

In the first place, the Bank never directly requested that the District Court allow it fees. Such a request was included in Buchhalter's tendered and rejected findings of fact (page 43, R.). It is true, the Bank concurred in those tendered findings, but it did not individually request fees any more than it individually requested that Rude be turned out of court because of his unclean hands and the various other matters going to comprise the requested findings. Buchhalter, as noted, appealed from all rejected findings, of which fees for the Bank was only one item. And it seems now to be asserted that the Bank, though by Rude, himself, made a party to his appeal, is to be regarded as not having been a party because it entered no appearance and filed no brief. If that position be correct, indeed a method partaking of simplicity itself has been newly discovered, whereby one may defeat the jurisdiction of a court, either appellate or of first instance. A disregard of process is all that is necessary. The Bank was, of course, before the Court. Its answer requesting instructions was before the Court. Buchhalter's appeal

from the District Court's refusal to award the Bank fees was before the Court. The Court's inherent power to enter it own decree dissipates every contention made by petitioner under this heading. Besides that, as noted, Rude himself urged the Court of Appeals to dispose of the controversy.

CONCLUSION.

This is simply a fact case, resolved (on the defendant's showing) by the Court of Appeals in favor of petitioner, contrary to his sworn pleadings and testimony, so far as interest in the escrow is concerned. He now boldly asserts that he is a proportionate owner of the bonds, notwithstanding his oaths and his counsel's concession to the contrary. He insists that his once corruptly disclaimed interest must be awarded him free from either castigation or condition. All and singular the questions raised by the petition in this case are purely academic so far as Rude is concerned. He is in no position to raise them, even assuming they were of substance, which they are not. Had he set out in the first instance to claim his now asserted proportionate interest, however unnecessarily or vexatiously, it is true that in such case equity would make no exactions of him in manner and form as the Court of Appeals has decreed. But according to the findings, his testimony was "materially false;" his suit was "conceived in bad faith;" his claims were "groundless;" his conduct "unconscionable." He requested the Court of Appeals to give him relief, not on his own theory or his own testimony, but on the hypothesis of the defense pleaded and established by Buchhalter. He requested.

amongst other things, an accounting and he procured more than his rights, under the circumstances. He complains of a decree of the Court of Appeals giving him property as a matter of grace, not as a matter of right, under the circumstances. That the Court was not sufficiently gracious constitutes, in effect, the burden of his entire petition. He says he has been deprived of property without due process. He fails to note that had the Court of Appeals not awarded him his interest, in the face of his corrupt conduct, he would, so far as this litigation goes, have no property concerning which he could raise that claim. He would, instead, be merely possessed of such action at law, if any, as he could devise. In view of the record in this cause, that would be not only nebulous, but hazardous in the extreme.

It is time that an end be put to this controversy It has at all times been worse than vexatious. It has become intolerable. Certiorari should be denied.

Very respectfully submitted,

HENRY E. LUTZ,

Counsel for Buchhalter, Blount, Silverstein and Rosner, Respondents.